Office Supreme Court, U.S.
FILED
JAN 15 1964
JOHN F. DAVIS, CLERK

No. 764

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

FRANK SORCE, JAMES FALCO, THOMAS MALLOY,
Petitioners.

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
List of Authorities Cited	i
Opinions Below	1
Grounds of Court's Jurisdiction	2
Questions Presented	2
Constitutional Provision and Statute Involved	3
Nature of Case	3
Statement of Facts	4-12
Reasons for Granting Writ	13-26
Conclusion	27
Opinion of the Court of Appeals	Appendix A 1a-6a
Constitutional and Statutory Provisions Involved	Appendix B 6a

List of Authorities

Cases

Asgill v. United States, 4 Cir., 60 F. 2d 776	23
Baysden v. United States, 4 Cir., 271 F. 2d 325	16
Degnan v. United States, 2 Cir., 271 F. 878	18
Hall v. United States, 8 Cir., 182 F. 2d 833	18
Henry v. United States, 361 U. S. 98	14,15, 16
Kasle v. United States, 6 Cir., 233 F. 878	18
Lee v. United States, C. A. D. C., 232 F. 2d 354	16
Minner v. United States, 10 Cir., 57 F. 2d 506	25

PAGE

United States v. Carengella, 7 Cir., 198 F. 2d 3 17-22

United States v. Evans, D. C. D. C., 194 F. Supp. 90 17

United States v. Lefkowitz, 2 Cir., 283 F. 2d 310 19

United States v. Minieri, 2 Cir., 303 F. 2d 550 20

United States v. Roister, N. D. Ohio, 204 F. Supp. 760 17

United States v. Simone, 2 Cir., 205 F. 2d 480 19

United States v. Wainer, 7 Cir., 170 F. 2d 603 19

Watson v. United States, 3 Cir., 6 F. 2d 870 26

Weaver v. United States, 5 Cir., 295 F. 2d 360 17

Williams v. United States, C. A. D. C., 263 F. 2d 487 20

Constitution, Statutes and Rules

Fourth Amendment, Constitution of the United States 13, 16

Rule 41 of the Federal Rules of Criminal Procedure 16

Appendix A

Opinion of the United States Court of Appeals for the Seventh Circuit 1a-5a

Appendix B

Constitutional and Statutory Provisions Involved 6a

Conflict with decisions of United States 6a

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No.

FRANK SORCE, JAMES FALCO, THOMAS MALLOY,
Petitioners.

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioners, Frank Sorce, James Falco and Thomas Malloy, pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit in the above case.

OPINIONS BELOW.

1. The decision of the United States Court of Appeals for the Seventh Circuit affirming the district court's finding of guilty and judgment of the finding of the three petitioners which was rendered November 1, 1963 and a petition for rehearing was denied December 9, 1963.

2. The opinion as set forth herein as Appendix A as set out on Page 6(a).

GROUNDS OF THIS COURT'S JURISDICTION.

This petition is filed within 90 days of the denial of the petition for rehearing by the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED.

1. Are the petitioners being deprived of their constitutional rights in regard to the search and seizure of certain tents, the defendants being in a public place, it being contended that this was not a search incident to arrest, but an arrest incident to the seizure.

2. Are the petitioners being deprived of their constitutional rights in regards to search and seizure of certain tents being the subject of the indictment, the only probable cause lying upon the fact that the entry of an agent in a public place and a mere view of a small label on some boxes merely indicating that a certain box was going to Sears-Roebuck in Buffalo: New York, was sufficient to constitute a search or an arrest without any identification of the contents.

3. Does the mere presence of the petitioner, Malloy, in a public place near the goods that were stolen some fifteen days before constitute sufficient evidence of guilt? Does the presence of the petitioner, Falco, or the petitioner, Sorce, unloading certain goods which were later found to have been stolen constitute sufficient evidence to warrant a conviction?

4. Does the limitation and restriction of cross examination on the issue of probable cause as to the legality or irregularity of search and seizure constitute prejudice to the petitioners? Wherein the court denies the produc-

tion of certain documents which appears to be contrary to the decision in *Asgill v. U. S.*, 60 Fed. 2d 776, which appears to be in conflict with the decision of another court.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED.

The Constitutional provision and statute involved are:

1. The Fourth Amendment to the United States Constitution and Rule 41.

NATURE OF CASE.

This action was instituted by the filing of an indictment in one count under the provisions of Title 18, United States Code, Section 659, charging the defendants, and each of them, with knowing and wilful possession of Seven Camping Tents of a value in excess of $100.00, which said tents had been stolen at Chicago, Illinois, while they were then in the course of transportation from Chicago, Illinois, to the State of New York, and which tents the said Defendants, and each of them, knew had been stolen and unlawfully taken and carried away.

The Court, sitting without a jury, entered a judgment of guilty as charged as to each of the defendants, and imposed sentence, from which this appeal is taken. The errors relied on arise out of the sufficiency of evidence; variance of proof; rulings on evidence, both admission and exclusion; limitation on cross-examination; failure to suppress evidence.

STATEMENT OF FACTS.

On the 4th day of June, 1962, the Defendants, Frank Sorce, James Falco, and Thomas Malloy, were indicted in one count for knowingly, wilfully and unlawfully possessing seven camping tents of a value in excess of One Hundred Dollars ($100.00), which said tents were alleged to have been stolen and unlawfully taken and carried away from Trans-American Trailer No. 3063, located at Cermak Road and Throop Street, Chicago, Illinois, and from the care, custody, control and possession of Trans-American Freight Lines. It is further charged that said tents were at the time of the unlawful theft and taking in the course of interstate transportation from Terminal Freight Cooperative Association, Chicago, Illinois, to the State of New York. It is also charged that the named defendants knew the tents had been stolen and unlawfully taken (A. 1, 3). The Defendant, Sorce, was released on $5,000.00 bond, and the defendants Falco and Malloy on $7,500.00 bond, pending disposition.

On June 21, 1962, each of the defendants pleaded not guilty to the charge (A. 3).

On November 27, 1962, defendants Frank Sorce and James Falco, moved to suppress certain evidence, obtained on May 8, 1962, by agents of the Federal Bureau of Investigation, while on the premises of Frank Sorce known as the Ten Acre Garden Center, on which premises said agents are alleged to have conducted a general exploratory search, and pursuant to said search, seized articles and things, including the seven tents described in the indictment. The Motion charged that the search and seizure was conducted without any warrant, search war-

rant or other process, and that the agents were not in possession of facts and information justifying their entry on and search of the premises without due process (A. 4-5). A hearing was had on the Motion (A. 29-38). The Motion to Suppress was denied (A. 40, 41).

Trial was had on the indictment and the several not guilty pleas, before the Court, sitting without a jury, subject to a ruling on the Motion To Suppress Evidence on November 29 and 30, 1962 (A. 6-28). At the conclusion of the Government's case, the defendants and each of them, moved for judgment of acquittal, which motion was denied (A. 41). The defendants introduced no evidence on their own behalf (A. 40), and their respective motions for judgment of acquittal at the close of all the evidence, for new trial and in arrest of Judgment (A. 40) were each and all denied (A. 41-2); and the defendants were found guilty as charged.

On November 30, 1962, judgments were entered on the finding, and each of the defendants sentenced to the custody of the Attorney General for a term of Two (2) years (A. 42-45).

Pending appeal, the defendant Sorce has been released on bond in the amount of Ten Thousand Dollars ($10,000.00) and the defendants Falco and Malloy in the amount of Fourteen Thousand Dollars ($14,000.00) each (A. 42-45).

Notice of Appeal from the aforesaid judgments and convictions was filed on December 10, 1962 (A. 46-47).

THE EVIDENCE.

The Motion to Suppress.

Walter M. Higgs, an agent of the Federal Bureau of Investigation, testified that on April 25, 1962, his supervisor, one Hamre, told him that three nights before, Trans-American Freight Lines Trailer Number 3063 had been stolen from their lot, containing a Sears Roebuck shipment going to Buffalo, New York. One Agent Thompson showed the witness the bills of lading covering various Sears Roebuck merchandise, and they discussed the contents of said bills of lading. The witness saw the documents only at a distance and did not examine them in any detail. Thompson told the witness they were Sears Roebuck articles. The witness did not pick out the specific description of any article on the bill of lading. In this discussion neither the Blue Top Turkey Farm, nor the Ten Acre Nursery were discussed.

The witness went out to the Blue Top Turkey Farm on April 25.

Eleven days later on May 6, 1962, Higgs was near Blue Top Turkey Farm, though he was never there, nor on any other date on the premises. One Agent Ford told Higgs that in the early morning hours of that day, a 1962 Pontiac, Illinois license LY 8585 and an old blue panel delivery truck left the Blue Top Turkey Farm and went to the Ten Acre Garden Center. No advice was given Agent Higgs as to the content of either vehicle, or the persons occupying it.

Two days later, on May 8, 1962, at 12:30 p.m., the witness saw an old model dark blue Chevrolet truck, 1962 license D-8130 and bearing the legend "R.H.Blue, Wooddale, Illinois" on the side, back into a large open door on the east side of the Blue Top Turkey Farm and

Falco and Malloy, loading cartons on it. He did not know with what the truck was being loaded (A. 20, 22). It was there for about an hour and when it left, Falco was driving and the back end was full of cardboard cartons (A. 20).

One Agent Kalberkamp told Higgs he had seen the Pontiac and the delivery truck leave the turkey farm and go to the garden center. He described the truck as bearing the legend "R.H.True, Wooddale, Illinois." This conversation apparently occurred on May 8, on the way from Blue Top Turkey Farm to the Ten Acre Garden Center. At that time, no one advised the witness of the contents of that truck. At about 2:35, the witness Higgs, together with the two other agents, one Sheridan and Kalberkamp, left the vicinity of the Blue Top Turkey Farm and went to the Ten Acre Garden Center (A. 29-38).

They drove up and down Route 53, past the Garden Center, four or five times, and the witness saw Soree, Falco and Malloy unloading the truck, taking cartons off the back, stripping the cartons off and burning the cartons. Some of the "stuff" was put on the ground, and Malloy was putting some of the "stuff" in a shed (A. 20-21). From where they were, the agents could not see the contents of the truck (A. 22, 24).

Four agents, Sheridan, Kalberkamp, Noonan and the witness Higgs, then pulled into the Ten Acre Garden Center (an open air market, selling plants and various shrubs (A. 21). They entered with the purpose of seeing what was being unloaded and to attempt to obtain the merchandise before the cartons were burned (A. 23). The primary purpose in entering was to see what was going on back behind the truck (A. 24).

They had no warrant or search warrant when they entered the premises (A. 39).

THE EVIDENCE OBTAINED

General

Higgs walked through the display section and approached the truck at the back of the nursery. Sorce approached him. Falco was on the back of the truck. Higgs asked Sorce if he had any tomato plants, and Sorce told Higgs they were in the front of the lot. Higgs stepped around Sorce and saw cartons on the back of the truck and on the ground. The carton on the truck was addressed to Sears Roebuck and Company, Buffalo, New York, which address was clearly visible. Only one of the seven tents described in this indictment was on the truck. The rest were on the ground. The boxes were labelled "J.C. Higgs Camp Tents" from the Hawthorn Finishing Company. A small label on most of the boxes indicated it was going to Sears Roebuck in Buffalo, New York. The three were then placed under arrest (A. 21-22). The tents (Exhibits 1 through 7) were then inventoried by the Federal Bureau of Investigation, and taken into possession by them. (A. 7). The tents had a retail value of $165.83, all told; a cost value of $104.57 (A. 27).

EVIDENCE ADMITTED AGAINST SORCE ONLY

After Higgs went around Sorce so he could see the labels on the cartons on the truck, he identified himself and asked Sorce if he owned a Sears Roebuck store and Sorce said "No." Higgs then asked him to whom the merchandise on the truck and on the ground belonged, and Sorce said it was his (A. 21). He said he had purchased it from somebody (A. 24).

EVIDENCE ADMITTED AGAINST FALCO ONLY

Falco jumped down off the truck just before he was placed under arrest (A. 22). He told Higgs he had been asked by Soreo to back the truck up from the front of the lot to the rear, that he had been asked to help unload the truck and he was helping unload it (A. 24).

EVIDENCE ADMITTED AGAINST MALLOY ONLY

Malloy was arrested as he was coming out of the little shed at the back of the nursery property (A. 21). He was never seen on or in the truck. He was never seen in possession of the tents (A. 24, 26). He was seen about 1:40 P.M. on May 8, 1962, leaving the turkey farm riding in a Pontiac automobile with Soreo driving and going to the nursery (A. 25). After he was arrested, he told the F.B.I. that he lived in Chicago and had known Falco for about five years, that Falco visited at his home about May 1 and he told Falco he needed work; that on May 6, Falco told him he might have work for him at the Garden Center; that he went to work there on May 7 at $20 per day loading tomato plants and shrubs; that on May 8 in the afternoon a truck came into the Garden Center and he was instructed by the Manager to assist in the unloading, which he did; that he did not know the cartons were stolen, nor what was in the cartons, nor what the cartons were, nor that they were Sears Roebuck cartons. He said he had not been at the Blue Top Turkey Farms (A. 26-27).

INTERSTATE COMMERCE AND PROOF OF THEFT OF TENTS

Exhibits 1 through 7 are tents, the subject matter of this action.

The interstate character of the shipment and proof that the tents, the subject matter of the indictment, were

stolen begins with Exhibits 8 and 9. According to the testimony of one Donald Czadek, a terminal manager for Terminal Freight Cooperative Association, located in Chicago, Illinois, these documents (Exhibits 8 and 9) were prepared at the Hawthorn Finishing Company in New Haven, Missouri.

Exhibits 8 and 9 are shipping orders indicating certain materials were received from Hawthorn at New Haven, consigned to Sears Roebuck & Co., Store 2334 at Niagara Falls, New York, said shipments to be routed in care of Terminal Freight.

Exhibit 8 described one carton of tents, and an order number assigned to the carton is R 517928.

Exhibit 9 described 66 cartons of merchandise, either in bundles or cartons, each of which 66 bundles or cartons bear one of three order numbers: R 119709, R 119650, or R 119674.

These order numbers were placed on the cartons by Hawthorn Finishing Company in New Haven, Missouri.

Czadek testified that Exhibits 8 and 9 were first seen by him in Chicago; that it was regular procedure to receive such a document from a driver bringing a shipment. He testified that the first time he saw the document was when it was presented to him in Chicago. He testified that Government's Exhibit number 8 calls for one carton, order number R 517928; that government's Exhibit 3 is that carton.

The cartons which are government's Exhibits 1, 5, 6 and 7 bear the number R 119650; the cartons which are government's exhibits 2 and 4 bear the number R 119709 (A. 49-50).

The witness testified that government's Exhibit 10 is a consolidated bill of lading made under his supervision on April 20, 1962, at their terminal, covering shipments received for Sears Roebuck at Niagara Falls, New York, which were loaded on to Trans-American trailer 3063, and made in the regular course of business; in part, the tent description found on Exhibit 8 has been copied thereon. He testified that Exhibit 11 was also a consolidated bill of lading covering shipments to Sears Roebuck, Buffalo, New York; in part, it copies the tent description found on Exhibit 9. Czadek testified that the two exhibits were made by parties known to him and under his supervision during some part of the day. He testified that the order numbers appearing on government's exhibits 8, 9, 10 and 11 do not appear on any freight other than the freight loaded on Trans-American Trailer number 3063, on April 19, 1962 (A. 8-12).

Frederick J. Arbuthnot testified that he was office manager for Trans-American Freight Lines, and that that Company has a trailer number 3063. He testified that Government's Exhibit 12 (copy of Exhibit 10, except for pencilled markings thereon) was a bill of lading given them by Terminal Freight Cooperative Association on a shipment going to Sears Roebuck Store 2334, Niagara Falls, New York, covered by their freight bill 197173, covering trailer load 3063; that exhibit 13 (copy of Exhibit 11, except for pencilled markings thereon) is a bill of lading given them by the same Association on trailer load 3063 going to Sears Roebuck Store 1234 at Buffalo, New York; that Exhibit 14 is their freight bill 159172 covering a shipment on trailer 3063 on April 20, going to Buffalo, New York; that Exhibit 15 is their freight bill 150 173 covering trailer load 3063 to Sears Roebuck, Niagara Falls, New York. He testified that the order

numbers and the carton numbers on Exhibits 1 through 7 appear on Exhibits 12 and 13.

He testified that the destination of trailer 3063 was Buffalo, New York and was dispatched at 4:30 p.m. He testified that number 119 790 described 69 pieces of merchandise, that there were more than 151 pieces of merchandise on the trailer (A. 18-20).

John Kelly testified that on April 19, 1962, he was at door 55 loading Trans-American Trailer 3063; that the initials "J.K." on government's Exhibits 8 and 9 are in his handwriting and were placed there April 19, 1962, after the merchandise had been checked in, having order numbers corresponding with the bill of lading checked against the number of cartons, on the material loaded on the trailer. He testified that he put his initials on government Exhibit 9 after they had loaded the merchandise for Buffalo, New York Store 1234. He testified that he loaded Exhibits 1 through 7 on Trans-American Trailer 3063 on April 19, 1962. He testified that there are a lot of manufacturers that could have the same size cartons as Exhibits 1 through 7; that he could not recall anything else that he loaded on the truck that day (A. 14-17).

On April 20, 1962, at 1:30 p.m., trailer number 3063 after being loaded with the freight, was sealed and driven from door 55 of the Terminal Freight Cooperative Association, 5534 West 26th Street, Cicero, Illinois, to the trailer yard of Trans-American Freight Lines, Inc., located at 22nd Street and Throop. It was parked in the yard at approximately 4:30 p.m.; at about 7:30 p.m. Trans-American trailer number 3063 was discovered missing from the trailer yard at 22nd Street and Throop. On April 23, 1962, trailer number 0363 was located at 16th Street and Western Avenue, with the seal broken and almost all of the freight missing (A. 6-7).

REASONS FOR GRANTING THE WRIT

This Court should exercise its jurisdiction in this case for the following reasons:

I. THERE IS INVOLVED HEREIN AN IMPORTANT QUESTION CONCERNING THE SEARCH AND SEIZURE OF CERTAIN TENTS TAKEN IN INTERSTATE COMMERCE IN A PUBLIC PLACE IN WHICH THERE WAS CONTENDED THAT THE SEIZURES WERE MADE BEFORE THE ARREST, OUR CONTENTION BEING THAT THE ARREST WAS INCIDENT TO THE SEARCH AND NOT THE SEARCH INCIDENT TO THE ARREST. THIS INVOLVES A POSSIBLE VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The issue in this case is whether there was probable cause on May 8, 1962 for the entry of the FBI agent upon the premises of the Top Acre Garden Center, leading to the search that produced the evidence upon which this conviction rests. A timely motion to suppress that evidence was made by the defendants, and overruled by the District Court. The evidence on the probable cause issue, resting entirely upon the testimony of the witness Higgs is as follows:

On April 23, fifteen days before the illegal entry, Higgs was told by his supervisor that there had been a theft of a trailer, number 3663, containing a Sears Roebuck shipment going to Buffalo, New York. Higgs was shown the bills of lading covering the various Sears Roebuck merchandise but the witness saw them only at a distance and did not examine them in detail. The witness could not pick out the specific description of any article on the bills of lading. On May 8 at just past noon, Higgs saw an old model dark Chevrolet truck back into a large open door on the east side of the Blue Top Turkey Farm and saw Falco and Malloy, two of the defendants, loading

cartons onto it. He did not know with what the truck was being loaded (A. 20-22). After about an hour the truck left with Falco driving, and the back end had cardboard cartons in it (A. 30). Higgs was told by another agent, one Kalberkamp, that the truck, having left the turkey farm, went to the Ten Acre Garden Center. Higgs still had no advice as to the contents of the truck. Beginning at about 2:35 in the afternoon Higgs and two other agents rode up and down past the Garden Center and saw the three defendants unloading the truck, taking cartons off the back, stripping the cartons off, and burning the cartons. From where they were, none of the agents could see the contents of the truck (A. 22, 24). Thereupon they entered on to the Ten Acre Garden Center premises with the purpose of seeing what was being unloaded and to attempt to obtain the merchandise before the cartons were burned (A. 23). Higgs testified that his primary purpose in entering was to see what was going on back behind the truck (A. 24). He walked through the display section of the Garden Center and approached the truck at the back of the nursery. He was there approached by Soree, and observed Falco on the back of the truck. He stepped around Soree and saw cartons on the back of the truck and on the ground. A small label on most of the boxes indicated the box was going to Sears Roebuck in Buffalo, New York. Thereupon the three defendants were placed under arrest (A. 21-22). These boxes are government's Exhibits 1 through 7.

It is our respectful submission that the record clearly shows a want of probable cause for the illicit entry. This case is remarkably close to the circumstances in *Henry* v. *U. S.*, 361 U.S. 98. There the Supreme Court said at pages 103 and 104:

> "So far as the record shows, petitioner had not even been suspected of criminal activity prior to this

time. Riding in the car, stopping in an alley, picking up packages, driving away—these were all acts that were outwardly innocent. Their movements in the car had no mark of fleeing men or men acting furtively. The case might be different if the packages had been taken from a terminal or from an interstate trucking platform. But they were not. As we have said, the alley where the packages were picked up was in a residential section.

"The fact that packages have been stolen does not make every man who carries a package subject to arrest nor the package subject to seizure. The police must have reasonable grounds to believe that the particular package carried by the citizen is contraband."

There can be no contention that this was a search incident to arrest. On the contrary, the arrest was incident to the search. Any such search and seizure is condemned by the Fourth Amendment.

"The testimony shows that the search and seizure preceded the arrest, and that the officers intended by the entry and search to secure evidence upon which to predicate the subsequent arrest. Captain Shiman, who was in charge, was asked if he had placed Lee under arrest. Replying that he had, he stated, 'Before we left, I said, "I am going to take you in and charge you with these guns, unless you can explain them".' He also said, 'He was arrested when the guns were produced, as soon as we identified the guns.' Officer Sears, who accompanied Captain Shiman, when asked whether he had placed Lee under arrest replied affirmatively, adding, 'We had to take him down as a result of these guns being here * * *.' All of this testimony shows that the guns were seized before the arrest, and that the arrest in fact was caused by the discovery of the guns. The police had gone to appellant's apartment with the purpose of checking on the tip from the 'reliable

source' that the guns were there, and upon verifying that tip they arrested appellant. A number of courts have held in similar circumstances that such a search is not incident to the arrest, but rather the arrest is in truth incident to the search. *United States* v. *Pollack*, D.C.D.N.J., 64 F. Supp. 554, 558; *United States* v. *Sully*, D.C.S.D.N.Y., 56 F. Supp. 942; *Henderson* v. *United States*, 4 Cir., 12 F. 2d 528, 51 A.L.R. 420; Cf. *McKnight* v. *United States*, 87 U.S. App. D.C. 151, 183 F. 2d 977; *United States* v. *McCann*, D.C.S.D.N.Y., 40 F. 2d 295; *United States* v. *Setaro*, D.C.D. Conn., 37 F. 2d 134. And of course the search cannot be justified by what it turned up. *United States* v. *Di Re*, 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210; *Byars* v. *United States*, 273 U.S. 28, 47 S. Ct. 248, 71 L. Ed. 520." *Lee* v. *United States*, C.A.D.C., 232 F. 2d 354, 355-6.

The case before this Court gives even less cause for the entry. Here there does not appear any "tip" or information from any source that the goods were on the premises.

It is, of course, basic that the inhibitions of the Fourth Amendment and Rule 41 apply as well to a place of business, as to the search of a house. *Bansden* v. *United States*, 4 Cir., 271 F. 2d 325, 327.

Nor can it be contended that the seizure was only subsequent to the arrest, that the evidence was not seized, but only visual observations made prior to the arrest, the seizure occurring thereafter, and, therefore, the proceedings legal.

> "the court refused to suppress the evidence, apparently on the ground that it was obtained visually and not physically seized. We are cited to no decision holding, and we can think of no reason why, such evidence is not subject to the rule excluding evidence

obtained by an unlawful search. The purpose of the rule, *see McDonald* v. *United States*, 335 U.S. 451, 455, 456, 69 S. Ct. 191, 93 L. Ed. 153 covers this case as though the coat itself with the missing button had been illegally seized and offered in evidence.

"We find no basis in the cases or in logic for distinguishing between the introduction into evidence of physical objects illegally taken and the introduction of testimony concerning objects illegally taken and the introduction of testimony concerning objects illegally observed. We are aware of no case which makes this distinction.

"*McGinnis* v. *United States*, 1 Cir., 227 F. 2d 598, 603. And see *Silver Thorne Lumber Co.* v. *United States*, *supra*, 251 U.S. at pages 391-392, 40 S. Ct. at page 182". *Williams* v. *United States*, C.A.D.C., 263 F. 2d 487, 489.

See also *Walker* v. *United States*, 5 Cir., 295 F. 2d 360, 361; *United States* v. *Roister*, N.D. Ohio, 204 F. Supp. 760, 763. Particularly applicable is the statement of the United States District Court for the District of Columbia, in the *United States* v. *Evans*, 194 F. Supp. 90 at page 93.

"The Government's contention that the officers lacked probable cause to seek a warrant until they were sure that the property was in the apartment—made in connection with its argument that the purpose of the visit was talk and not search—does not excuse the search; it is further reason for regretting that the search occurred." * * * .

The testimony of the observation of the cartons should have been suppressed; the arrest of the defendants, based on such observation, held illegal, and evidence of their statements suppressed; and, the seizure of Exhibits 1 through 7 held invalid.

II. THAT THERE IS INVOLVED HERE AN IMPORTANT QUESTION AS TO WHETHER OR NOT MERE EVIDENCE OF PRESENCE BY EITHER ONE OR ALL IS SUFFICIENT TO CONVICT FOR THE POSSESSION OF STOLEN PROPERTY.

There is a failure of proof and that is in regard to the allegation that "The said defendants then and there well knew the aforesaid goods and chattels to have been stolen and unlawfully taken and carried away," and to the allegation that the goods were illegally possessed.

Sorce.

On May 8, 1962, Sorce was observed from a distance, assisting in taking off cartons from the back of a truck—which said cartons have been described solely as "Stuff"—and being put on the ground (A. 21). No one saw the contents of the truck as it was being unloaded (A. 22, 24). Later, on the premises of the Ten Acre Garden Center, 6 cartons containing 6 of the 7 tents, the subject matter of this indictment, were found on the ground in the back of the nursery and near the truck, and another was found on the truck. Sorce was asked if he owned a Sears Roebuck Store (the cartons had a small label on each of them indicating they were going to Sears Roebuck), Sorce said, "No". He then stated that the merchandise on the truck and on the ground was his, and that he had purchased it from someone (A. 21-24). This is the whole of the evidence against Sorce.

It is well established that mere possession is not enough to establish guilty knowledge that goods were stolen, *Degnan* v. *U. S.*, 2 Cir., 271 F. 291; That no presumption of guilty knowledge is raised by such possession, *Kasle* v. *United States*, 6 Cir., 233 F. 878, 890. In order to convict the owner of the premises on which stolen goods are found, it is necessary to prove more than mere ownership

of the premises, *U. S.* v. *Simone, et al.*, 2nd Cir., 205 F. 2d 480, 482. From the testimony it appears that the activity on and about the truck occurred in broad daylight, apparently around 3:00 p.m. in the Springtime, during the period when daylight saving time was in force.

All of the activities of the defendant, observed by the agents of the Federal Bureau of Investigation, appeared to have been done in the height of the day, without surreptitiousness, or effort of concealment, and the activity was clearly visible from a distance of 130 feet (A. 22). Since possession is not enough to establish a guilty knowledge and since the ownership of the premises is not enough to establish guilty knowledge, and since all of the circumstances relative to the observations of Soree, as well as the other defendants, are devoid of any circumstances giving rise to any inference of guilty knowledge, it is obvious that proof of this essential element has totally failed.

Falco.

The matters stated hereinabove relative to Soree are equally applicable to Falco except the admissions of Soree, relative to ownership of the goods and the fact that Soree was the owner of the premises upon which the goods were found. The evidence as to Falco is that he was seen driving the dark blue Chevrolet truck, upon which one of the 7 cartons was later found and next to which the other 6 were found. This observation was two hours prior to the agents entering upon the premises and locating the merchandise. Further, at the time of locating the merchandise, Falco was on the truck. He told Higgs that he had been asked by Soree to back the truck up from the center of the lot to the rear, and that he had been asked to help unload the truck and that he was helping unload it. (A. 24). This is the entire evidence relating to Falco.

> "To 'possess' meant actual control carrying management of and not a passing control fleeting and shadowy in its nature. *State* v. *Cooper*, Mo. App., 32 S. W. 2d 1098, 1099." *U. S.* v. *Wainer*, 7 Cir., 170 F. 2d 603, 606.

It is plain that this record shows at most passing control in Falco. The most that can be inferred here, taking in the evidence and the inferences therefrom in the light most helpful to the government is that Falco at some time touched the goods. That would not warrant any inference of guilty knowledge, even in the absence of explanation. *U. S.* v. *Lefkowitz*, 2 Cir., 284 F. 2d 310, 315.

In the *Lefkowitz* case, even with positive proof that one of the defendants had touched the goods (finger prints), and a denial that he had been near the source of the shipment, the Second Circuit found sufficient evidence, "Only by a hair's breadth." There is no evidence in this record to support possession in Falco; much less is there evidence to support possession with the requisite guilty knowledge.

Malloy.

As to Malloy, there is not even evidence of his having touched the cartons. He was never seen on or in the truck in the vicinity of which the cartons were found. He was never seen in possession of the tents (A. 24-26). He denied having been at the Blue Top Turkey Farms, though he was seen about an hour and a half before the discovery of the tents, leaving the Turkey Farm, riding in a Pontiac automobile (A. 25, 26-27). But there is no evidence in the record that said Pontiac was ever used in any manner relative to the tents or the charges made. The evidence against Malloy is nil. It does not even come close to the case of the *U. S.* v. *Miniero*, 2nd Cir., 303 F. 2d 550, where there was an acquittal.

> "In the case before us there is no evidence that Saponaro even touched the cartons. His fingerprints

were not on the cartons but on invoices found on the basement floor. As the touching of the cartons in Lefkowitz was not enough evidence to show possession of the cartons, so the handling of the invoices in this case was not enough evidence to permit the jury to find that Saponaro had ever had possession of the cartons. The invoices might have originally been inside the cartons that were of the shipment which was stolen, but the invoices were not the goods for the illegal possession of which the defendant was on trial. The circumstantial fingerprint evidence in this case is as consistent with the possibility that Saponaro innocently picked up the invoices from the floor after someone else had taken them out of the cartons as it is with the possibility that he took the invoices out of the cartons.

* * * * * *

"Evidence that a person was present where an illegal act occurred is not sufficient evidence, without more, to convict him of aiding and abetting that unlawful act. *United States* v. *Williams*, 341 U.S. 58, 71 S. Ct. 595, 95 L. Ed. 747 (1951); *United States* v. *Carangella*, 198 F. 2d ? (7 Cir.), cert. denied, 344 U. S. 881, 73 S. Ct. 179, 97 L. Ed. 682 (1952). *United States* v. *Wiley*, 267 F. 2d 453 (7 Cir., 1959) (dictum). Therefore, unlike the situation in Rapply, insufficient evidence was introduced in this trial for one justifiably to find that Saponaro aided and abetted the illegal possession of the stolen goods." 303 F. 2d at 556-7.

There clearly was insufficient evidence to convict. As to Falco and Malloy, there has been utter failure of proof relating to the essential element of possession.

As to all three defendants, there is a complete and utter failure of proof to sustain the essential element of guilty knowledge. Neither suspicious, covert activity, nor nocturnal enterprise, the most usual circumstances to reflect knowledge, are present here.

It is inconceivable, in our opinion, that the inference of guilty knowledge may be drawn from the possession of the tents by Sorce as recently stolen property. Certainly an interval between April 19 and May 8 (19 days) will not support the recent possession theory. But even if it did, it could not apply to Falco and Malloy.

> ". . . There is not a scintilla of evidence in this record that Di Vito and Blandi knew the whiskey was stolen. While mere possession of recently stolen property warrants the inference of guilty knowledge unless a satisfactory explanation of possession is made consistent with innocence, such an inference cannot apply here. . . ." *United States* v. *Carengella*, 7 Cir., 198 F. 2d 3, 7.

3. That there is involved, here where a constitutional right of search and seizure is involved a failure of the court to permit the attorney for the petitioner to have the government produce certain documents which might have shown the lack of probable cause as to the question of search and seizure of the stolen goods in question.

Upon concluding the government's presentation of the evidence on its case in chief, further evidence was presented restricted to the question of the legality or illegality of the search and seizure occurring on May 8, which has been discussed hereinbefore. Walter M. Higgs was the sole witness. On the government's direct, he testified to being advised of the theft of trailer number 3063 on April 23, 1962. He then testified to a surveillance he maintained of the Blue Top Turkey Farm on May 6 and 8, the advices he had received from other agents also maintaining surveillance at the Blue Top Turkey Farm and Ten Acre Garden Center (A. 29, 30-31).

In the course of the direct examination, he also testified that one agent Thompson had shown him certain bills

of lading covering various shipments of Sears Roebuck merchandise (A. 30). Defense counsel asked if those documents were available, and it developed that they were in the U. S. Attorney's office, two floors away. The following colloquy occurred:

> "Mr. Berg: If you want the originals, we will be glad to bring them up here, Mr. Callaghan.
>
> Mr. Callaghan: I would like to see the documents that Mr. Thompson and the witness discussed.
>
> The Court: You may cross-examine. There is no notice to produce any documents here before trial. This is your burden, Mr. Callaghan. I warned you about that in advance. You were perfectly willing and anxious and eager to proceed to trial in this way. I have no authority to direct the production of documents at this time. Therefore, if you are moving me to direct the government to do it, I deny your motion.
>
> Mr. Callaghan: I am moving you to do it in view of the fact that the witness has testified with respect to the 194 contents of the document which I think now—
>
> The Court: I will deny the motion.
>
> Mr. Callaghan: May I—
>
> The Court: Go ahead with your cross-examination.
>
> Mr. Callaghan: May I conclude my objection?—which I think now under these circumstances available to the defendants, he having testified to its contents.
>
> The Court: I have made my ruling. You may continue with the cross-examination" (A. 31, 32).

This, we submit, was error. A strikingly similar circumstance occurred in *Asgill* v. *United States*, 60 F. 2d 776. The Court of Appeals for the Fourth Circuit, in condemning the non-production stated:

> "Before this witness concluded her testimony in chief, the defendant's counsel had called upon the government to produce certain letters written by the witness,

addressed to the Bureau of War Risk Insurance or to the Treasury Department or to the Assistant Director in charge of compensation and insurance claims. The government's counsel promised to produce them, whereupon the defendant reserved the right of cross-examination of Alice White Allen, evidently awaiting production of these letters for that purpose. They were subsequently brought into court, but, after further consideration, the court refused to require their production, and denied the Plaintiff the right to introduce any of these letters in evidence. Counsel for the government argues, among other things, that defendant had no right to the use of these letters because no proper or timely demand was made upon the government for their production. This contention is without merit, since it is shown that the letters were in court and in the hands of the opposite party." 60 F. 2d at 778-9.

As we have stated, the witness under direct examination detailed his surveillance and the surveillance of others on May 6th and 8th, said surveillance apparently being related to the information given him by his supervisor on April 23rd, about the theft of Trailer No. 3063, and of the information he received from agent Thompson on April 23rd. On cross-examination he stated that after the conversation had taken place on April 23rd, he went out to the Blue Top Turkey Farm on April 25th (A. 33). Every question directed to April 25th was foreclosed by the court, upon the objection of the prosecutor. Defense counsel asked the witness who accompanied him on April 25th; whether he made observations on April 25th at the Blue Top Turkey Farm; whether he had not said he was at or near the premises of Blue Top Turkey Farm on that date; when after the conversation with Thompson he first went out to the vicinity of Blue Top Turkey Farm; when he went there for the first time; when he went for

the second time, if he was there more than once; whether he was there more than once; whether he was there prior to May 6th (A. 31-36).

The defendants respectfully submit that such restriction of cross-examination on the subject of the surveillance was gross and prejudicial error. The record makes it clear that Higgs was in the vicinity of Blue Top Turkey Farm on April 25th. The defendants were entitled to explore the question of whether that was part of his surveillance which was restricted on direct to May 6th and 8th. It certainly appears from the testimony given, that whatever occurred April 25th was part of the surveillance which extended to May 6th and 8th. This was one surveillance, not a series of divisible incidents. The government cannot show part of the transaction and not all. By the testimony on direct of Higgs' surveillance, the subject of his surveillance was opened up and cannot be limited to a partial showing. In this regard we direct the court to the decision of the 10th Circuit Court of Appeals in *Minner* v. *United States*, 57 F. 2d 506 at 507-8:

> "Counsel for Minner urge that the court erred in restricting their cross-examination of Madden. Madden's testimony tended to establish that Minner acted with criminal intent to bribe Madden. Minner's other official dealings with Madden about the same time had a material bearing upon the construction to be placed on the transactions and conversations which took place between Minner and Madden. A full cross-examination of the witness upon subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom such witness is called, and denial is prejudicial error. *Heard* v. *United States*, (C. C. A. 8) 255 F. 829; *Alford* v. *United States*, 282 U.S. 687, 691, 692, 51 S. Ct. 218, 75 L. Ed. 624. We conclude that the court erred in so restricting the cross-examination of Madd[illegible]."

Further, on cross-examination, substantially every other avenue of inquiry was blocked. Objection was sustained to questioning the witness when anyone first told him there was concealed on the premises of the Blue Top Turkey Farm any merchandise that had been taken off trailer number 3063; whether anyone told him prior to April 8th, 1962, that there was merchandise concealed on the premises of the Ten Acre Nursery; when he first learned that any merchandise that belonged to Sears Roebuck that had been on a truck was on the premises of Blue Top Turkey Farm; whether he had the bills of lading with him on May 8th when he entered the Ten Acre Nursery's premises; whether he had any description with him at that time of the property that had been on truck trailer number 3063; whether he first learned the contents of that truck after he had entered those premises; whether he knew the contents of that truck before he had gone out to those premises and examined the contents (A. 37-38).

It is clear that the aim and direction of that cross-examination was an effort to show that the source of the witnesses' information was secured illegally. The lower court's refusal to allow such inquiry is reversible error. *Watson v. United States*, 3 Cir., 6 F. 2d. 870, 871.

CONCLUSION

Wherefore, for the above and foregoing reasons, it is respectfully submitted that the Petition for Certiorari be granted.

Respectfully submitted.

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APPENDIX A.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 14087 SEPTEMBER TERM, 1963 SEPTEMBER SESSION, 1963*

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. FRANK SORCE, JAMES FALCO, THOMAS MALLOY, *Defendants-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 1, 1963

Before DUFFY, KILEY, and SWYGERT, *Circuit Judges.*

KILEY, *Circuit Judge.* Defendants were convicted by the District Court, without a jury, of "unlawfully, wilfully and knowingly hav[ing] in their possession" seven camping tents stolen from an interstate shipment, knowing the tents to have been stolen.[1] They have appealed.

A trailer loaded with freight shipped from Missouri and bound for New York was stolen in Chicago on April 20,

[1] 18 U. S. C. § 659 provides, so far as material here, that if goods moving as part of an interstate shipment of freight are stolen, "[w]hoever * * * has in his possession any such goods * * * knowing the same to have been * * * stolen" is guilty of an offense.

1962. It was found three days later with most of the freight gone. On May 8, 1962, government agents arrested the defendants, charging them with possession of the seven tents identified as part of the stolen freight.

The District Court, at the trial, denied defendants' timely motion to suppress the tents as evidence against them on the grounds that the tents were fruit of an unlawful search and seizure. Defendants claim error.

The arresting agents knew that merchandise, including camp tents, consigned by Hawthorne Finishing Company in New Haven, Missouri, to Sears, Roebuck in Buffalo, New York, had been stolen. They saw an "old model dark blue Chevrolet truck" backed up to a large open door of a building on the Blue Top Turkey Farm. They saw Falco and Malloy loading the truck with cardboard cartons. The truck, driven by Falco, left the farm accompanied by a Pontiac in which Soree and Malloy were riding. Both vehicles were driven into Ten Acre Garden Center. The agents drove by the Center three or four times, and saw Soree, Falco and Malloy unloading the cartons from the truck, stripping the cartons from the merchandise and burning the cartons. The merchandise was put on the ground and Malloy was putting some of it in a shed.

The agents entered the Center, an open air nursery selling plants and shrubs. One agent saw, "clearly visible," that the cartons were addressed to Sears, Roebuck in Buffalo, New York, from the Hawthorne Finishing Company, and saw the labels "J. C. Higgins Camp Tents." The agents, without warrant, arrested the defendants and seized the merchandise.

The principal question is whether there was "probable cause" for the arrest of defendants to support the subsequent search that produced the evidence on which this conviction rests. *Henry* v. *United States*, 361 U. S. 98 (1959).

We see no merit in defendants' contention that their arrest followed an unlawful search and seizure. In *Lee* v.

United States, 232 F. 2d 354 (D. C. Cir. 1956), the "testimony shows the guns were seized before the arrest" after an entry into Lee's home without warrant and with "compulsion." The testimony does not show here, as in *Lee*, that the arrest followed the search. The agents here observed, arrested and seized almost at once. At best for the defendants the "arrest, search and seizure were one transaction." *Martin* v. *United States*, 155 F. 2d 503 (5th Cir. 1946).

The agents' entry into "open air nursery" was not unlawful. *Hester* v. *United States*, 265 U. S. 57 (1924); *Martin* v. *United States*, 155 F. 2d 503 (5th Cir. 1946); *Monnette* v. *United States*, 299 F. 2d 847 (5th Cir. 1962). They did observe before entry, but this was no violation of privacy. The protection of the Fourth Amendment does not extend to "open fields," *Hester* v. *United States*, 265 U. S. 57, 59 (1924), nor to "enclosed or unenclosed grounds • • • around • • • houses," *Martin* v. *United States*, 155 F. 2d 503, 505 (5th Cir. 1946).

After their entry the agents observed the names and addresses on the cartons and made the arrest. Having seen the cartons with reasonable grounds for believing they were stolen goods, the agents reasonably could believe they were observing the commission of a crime which justified the arrest without a warrant. *Martin* v. *United States*, 155 F. 2d 503, 505 (5th Cir. 1946). This distinguishes *Henry* v. *United States*, 361 U. S. 98 (1959), where the cartons were not identified until after the arrest.

Defendants argue that the agents should have obtained a warrant after gaining the knowledge they had before entry. We think the agents were not unreasonable in acting when they did. If they had gone for a search warrant it is probable that the burning of the cartons would have destroyed the identifying marks. *See Johnson* v. *United States*, 333 U. S. 10, 14-15 (1948).

We think prudent men in the shoes of the agents would have seen enough to permit them to believe that defendants were violating the law. This is the test of legality of the

arrest, which in turn is determinative of the legality of a search incident to such arrest. *Henry* v. *United States*, 361 U. S. 98, 102 (1959).

Defendants claim prejudice in the District Court's limitation of cross-examination of the government's principal witness on the question of their arrest and the search and seizure. We see no error in the restriction of cross-examination with respect to surveillance on dates not covered by direct. This had to do with events weeks before the arrest, search or seizure question and is unimportant on that question.

The witness testified that his superior showed him photocopies of the bills of lading covering the shipments of the stolen goods. Defense attorney sought production of the documents and declined the government's offer to produce the "identical" originals which were readily available. The court denied the motion to have the photocopies produced. It later developed on cross-examination that the witness's information as to the contents of the documents was told him by his superior and he did not know what the documents showed as to details. We cannot see any error in that ruling of the court.

We see no error either in the introduction of exhibits 8 and 9, bills of lading showing the interstate character of the stolen shipment.[1] The questions raised by the defendants do not go to the admissibility of the documents but to the weight of the testimony of the witness who identified the exhibits. And we think there was proof otherwise that the contents in evidence were part of that interstate shipment.[2]

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[1] 18 U. S. C. § 659 provides in part:

"To establish the interstate * * * character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment wase made."

[2] 28 U. S. C. § 1732 provides that once the document is shown to have been made in the regular course of business it shall be admissible.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility."

The indictment charged the camping tents had been stolen from "Trans-American Trailer No. 3063 located at Cermak Road and Throop Street, Chicago, Illinois," while "under the care, custody, control and possession of the Trans-American Freight Lines," and at which time the goods were "in the course of transportation, to wit, from Terminal Freight Cooperative Association, Chicago, Illinois, to the State of New York." This was sufficient to inform the defendants of the charge against them. The proof that the shipment was from Missouri through Chicago to New York was not inconsistent with this charge. We see no merit to defendants' contention that there was a fatal variance between the indictment and the proof.

Finally it is claimed that the necessary possession and scienter were not proven. The testimony as to what the agents saw on May 8 at the Turkey Farm and the Garden Center, coupled with false exculpatory statements made by Falco and Malloy concerning their presence at the Garden Center, is sufficient to prove both elements. The evidence here is far different from that found insufficient to prove Saponaro had possession in *United States* v. *Minieri*, 303 F. 2d 550, 557 (2d Cir. 1962); or to prove DiVito and Blandi had possession or guilty knowledge in *United States* v. *Carengella*, 198 F. 2d 3, 7 (7th Cir. 1952).

The convictions are AFFIRMED.

APPENDIX B.

1. Constitutional and Statutory Provision Involved—

Amendment 4 to United States Constitution

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and person or persons to be seized. 28 U. S. Code, ¶ 2101 (c).

2. Seventh Circuit decision is in conflict with decisions of United States.

Asgill v. *United States*, 60 Fed. 2nd 776.

(a) This opinion indicates that the Court should have ordered the production of records that might have assisted the Court and the parties thereto in determining whether there was probable cause for the search and subsequently the arrest in the instant case.

(b) Conflict with *Henry* v. *United States*, 361 U. S. 98.

Minner v. *United States*, 10 Cir., 57 Fed. 2nd 506.

Bausden v. *U. S.*, 4 Cir., 271 F. 2d 325.

U. S. v. *Miniéri*, 2 Cir., 303 F. 2d 550.